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IN THE
COURT OF APPEALS OF INDIANA

RONALD EUGENE BATENICH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0803-CR-116
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0604-FA-22

October 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Ronald Eugene Batenich appeals his convictions for Child Molesting,[1] a class C felony, and Attempted Battery,[2] a class B misdemeanor. Specifically, Batenich argues that the convictions must be set aside because his trial counsel was ineffective and the evidence was insufficient to support his convictions. Although we conclude that Batenich's claims of error fail, we sua sponte find that the conviction and sentence for attempted battery must be set aside because it is a lesser included offense of the child molesting charge. Thus, we affirm in part, reverse in part, and remand with instructions that the trial court vacate Batenich's conviction and sentence for attempted battery.

FACTS

In April 2006, five-year-old H.M. was living with her mother, Sorrita Freeman, and Batenich, who was Freeman's husband, in a Hammond apartment. At approximately 9:45 p.m. on April 15, 2006, Freeman went to bed, leaving H.M. in Batenich's care.

At 1:45 the following morning, Freeman awoke and discovered that Batenich was not in bed with her. When Freeman walked into the living room, she observed Batenich awake and lying on the couch covered with a heavy comforter. After noticing Freeman, Batenich immediately pulled up the comforter and fidgeted with his hands underneath it. A washcloth was draped over the couch and a bottle of vegetable oil from the kitchen was sitting on the floor next to the couch. When Freeman asked Batenich what he was doing, he replied that he was "just masturbating." Tr. p. 71-72.

[1] Ind. Code § 35-42-4-3.

[2] Ind. Code § 35-41-5-1; I.C. § 35-42-2-1.

Freeman then noticed the top of H.M's hair under the comforter. Freeman turned on the living room light and removed the comforter. Freeman observed Batenich in a "spoon" position with his exposed penis against H.M.'s bare buttocks. Id. at 73-74, 130. H.M. was asleep and her pajama bottoms were on the floor. H.M.'s underwear had been pulled down to expose her buttocks, and Batenich's underwear and pajama bottoms were pulled down.

Freeman immediately pulled H.M. from the couch and ordered her to bed. Thereafter, Freeman began screaming at Batenich and hitting him. In response, Batenich threatened to kill himself with a knife and prescription medication. Freeman called the police, and Hammond Police Officer Rita Harper arrived at the scene. When Batenich attempted to walk away from the apartment, Officer Harper arrested him. Thereafter, Officer Harper examined H.M. and found a greasy, shiny substance on the inside of H.M.'s buttocks near her anus. Subsequent physical examinations revealed no penetration of H.M.'s vaginal or anal area, and H.M. has no memory of the events.

Following the incident, the State charged Batenich with one count of attempted child molesting as a class A felony and one count of child molesting as a class C felony. Batenich retained attorneys Walter Alvarez and Kirk Marrie as defense counsel.

At some point during the investigation, Batenich spoke with Detective Mark Biller. Batenich stated that on the evening in question, H.M. fell asleep on the couch. Batenich placed H.M. in her own bed, returned to the couch, and started to watch a movie that aroused him. Batenich then started to masturbate with vegetable oil but claimed that he fell asleep because he was too tired to achieve an erection. Although Batenich

surmised that H.M. must have returned to the living room couch later that evening while he was asleep, he offered no explanation as to why H.M.'s underwear was pulled down.

Batenich, who was a United States Postal Service letter carrier, also gave a statement to Special Agent Penelope Mundo. Batenich told Mundo that H.M. likely got oil on her buttocks when she crawled between him and the couch. Batenich was suspended from employment without pay pending resolution of the criminal charges.

Prior to trial, two attempts were made to depose Freeman, but she failed to attend, later attesting that Batenich had intimidated her into not attending those proceedings. Batenich had also requested his counsel to write a letter to the postal union to encourage the union to retain him while the charges were pending. Thereafter, defense counsel Marrie sent a letter to union representatives on August 8, 2006, indicating that the State had offered Batenich a plea agreement, pursuant to which he would plead guilty to class A misdemeanor battery. Marrie also stated that he could likely obtain a dismissal of all charges in light of Freeman's failure to attend the depositions. It was determined that a misdemeanor conviction could result in the reinstatement of Batenich's employment, but a felony conviction would result in termination.

Thereafter, it was established that the State had not offered Batenich a plea agreement with regard to class A misdemeanor battery and Batenich was aware of that misinformation. On October 5, 2006, after Freeman failed to appear for the second deposition, Batenich's counsel successfully moved to exclude her testimony at trial pending her availability for deposition. Freeman was deposed on the third attempt, and

Batenich subsequently rejected the only plea agreement offered by the State, which was to class C felony child molesting.

Following a jury trial that commenced on October 1, 2007, Batenich was found guilty of class C felony child molesting and attempted battery, a class B misdemeanor. Thereafter, Batenich was sentenced to six months on the attempted battery conviction and to a concurrent term of four years with three years executed and one year suspended to probation on the class C felony child molesting count.

Thereafter, Batenich retained new counsel and filed a motion to correct error, claiming that his trial counsel was ineffective for advising him to reject the plea agreement to the class A misdemeanor battery charge that was outlined in the correspondence to the union. Defense counsel Marrie testified at the hearing on the motion to correct error that no such plea agreement existed and that he drafted the correspondence on Batenich's behalf in an attempt to prevent him from being fired from his position at the postal service. Finding that no such plea agreement had been offered by the State for Batenich to reject, the trial court denied the motion to correct error. Batenich now appeals.

DISCUSSION AND DECISION

I. Ineffective Assistance of Counsel

Batenich argues that his convictions must be set aside because his trial counsel was ineffective. Specifically, Batenich contends that his trial counsel improperly advised him to reject a proposed plea agreement to class A misdemeanor battery, that counsel

failed to adequately cross-examine Freeman at trial, and that his trial counsel acted in a hostile manner toward him at trial.

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88.

Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. There is a strong presumption that counsel's representation was adequate, and this presumption can be rebutted only with strong and convincing evidence. Elisea v. State, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002). Finally, if a claim of ineffective assistance of counsel can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

In this case, the evidence presented at the hearing on Batenich's motion to correct error revealed that the State had never presented Batenich with an opportunity to plead guilty to battery as a class A misdemeanor. Rather, Batenich's counsel crafted such a proposed plea offer in a letter to postal service representatives in an attempt to save

Batenich's employment pending the resolution of the charges. Tr. p. 22-24, 41. Moreover, even if Batenich's defense counsel thought that the charges would be dismissed because of Freeman's refusal to attend the depositions, a plea agreement to class A misdemeanor battery simply did not exist. Thus, there was nothing for Batenich to reject. As a result, Batenich has failed to show that his trial counsel was ineffective on this basis.

With regard to Batenich's claim that defense counsel was ineffective for failing to cross-examine Freeman about her failure to appear for the first two depositions, the record demonstrates that the prosecutor questioned her on direct examination about her reluctance to be deposed. And her testimony on that issue was highly damaging to Batenich's credibility.

In particular, Freeman testified that she was scared because Batenich told her that no one would believe her because "she was black and he was white." Id. at 105. Batenich also stated to Freeman that he had the "upper hand" and that he would "use anything that he could" to have her children taken away. Id. at 105-06. Finally, Freeman testified that Batenich sent her a text message stating, "When I'm exonerated, I'll flush your life down the toilet like you did mine." Id. at 106.

When considering Freeman's testimony with regard to this issue, it is apparent that Batenich's counsel wisely decided against cross-examining Freeman in light of the damaging evidence that she presented against Batenich. Thus, Batenich has failed to show that his trial counsel was ineffective on this basis. See Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998) (holding that trial strategy is not subject to attack through an

ineffective assistance of counsel claim unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness).

Finally, Batenich claims that his counsel was ineffective because he "treated him in a hostile and accusatory manner" during the course of direct examination. Appellant's Br. P. 9. At trial, two of Batenich's prior inconsistent statements were admitted into evidence against him. Tr. p. 229-31, 258-69. Thereafter, during direct examination, Batenich's defense counsel asked, in a straightforward manner, whether Batenich had inappropriately touched H.M. Id. at 332. After Batenich denied the charges, defense counsel provided him with several additional opportunities to explain his innocence and rebut the State's evidence against him. Id. at 347-50, 353-55, 361.

Under these circumstances, where the State's witnesses had portrayed Batenich as a manipulative individual prior to his testimony and the State's cross-examination of him would likely be damaging, it was not unreasonable for defense counsel to examine him in that manner. Contrary to Batenich's contention, the nature of the questioning was not ambiguous, and it is apparent that defense counsel was employing a strategy to afford Batenich the opportunity to rebut the State's evidence. Batenich's speculation that the jury believed that counsel thought that he was a liar and was guilty of the charged offenses is unfounded—especially in light of the fact that Batenich was not convicted of the class A felony child molesting charge, but found guilty of only the lesser-included offense of attempted battery as a class B misdemeanor. As a result, Batenich has failed to show that his trial counsel was ineffective.

II. Sufficiency of the Evidence

Batenich argues that the evidence was insufficient to support his convictions for child molesting and attempted battery. Specifically, Batenich contends that the convictions must be set aside because "there is no forensic or medical evidence to suggest that [H.M.] was sexually molested or unlawfully or insolently touched, nor to suggest Batenich took any sort of 'substantial step' toward so abusing her." Appellant's Br. p. 7.

In reviewing Batenich's challenge to the sufficiency of the evidence, we initially observe that we will not reweigh the evidence or judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and the reasonable inferences supporting the verdict, and we will affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

We also note that the intent element of child molesting may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000). This court has found that the trier of fact can reasonably infer intent to arouse sexual desires when the evidence establishes that the defendant intentionally touched the victim's genitals, Kirk v. State, 797 N.E.2d 837, 841 (Ind. Ct. App. 2003), and where there was evidence that the defendant touched the victim in an area in close proximity to the victim's genitals, Nuerge v. State, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997).

Indiana Code section 35-42-2-1 provides that "[a] person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a class B misdemeanor." Additionally, Indiana Code section 35-41-5-1 states that "[a] person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime." Finally, Indiana Code section 35-42-4-3(b) provides that "[a] person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony."

As discussed above, Freeman testified that when she walked into the living room, she observed Batenich lying on the couch covered with a heavy comforter. Tr. p. 66, 70, 121, 137. As soon as Batenich noticed Freeman, he pulled up the comforter and began to "fidget" with his hands underneath it. Id. at 70, 85, 129. Freeman noticed that a washcloth was draped over the couch and a bottle of vegetable oil was sitting on the floor within Batenich's reach. Id. at 71. When Freeman asked Batenich what he was doing, he responded that he was "just masturbating." Id. at 71-72, 125. However, when Freeman turned on the living room light and pulled the comforter away, she observed Batenich in a "spoon" position next to H.M. with his exposed penis against her bare buttocks. Id. at 71-74, 130. H.M.'s pajama bottoms were on the floor and her underwear had been pulled down to expose just her buttocks. Batenich's underwear and pajama bottoms were also pulled down. Id. at 74.

When Freeman started to "freak out," Batenich attempted to kill himself with a knife and prescription medication. Id. at 75, 145. After taking Batenich into custody, Officer Harper examined H.M. and discovered a "shiny substance" on the inside of H.M.'s buttocks around her anus. Id. at 83-84.

In our view, the evidence presented at trial supported the jury's finding that Batenich attempted to touch H.M. in a rude, insolent, and angry manner, and that he had, in fact, touched H.M. with the intent to arouse his sexual desires. Thus, we conclude that the evidence was sufficient to support Batenich's convictions.

III. Lesser Included Offense

Notwithstanding our conclusion that the evidence was sufficient, we sua sponte observe that Batenich's dual convictions for child molesting and attempted battery cannot stand. The informations initially charged Batenich with the following offenses:

> COUNT I—ATTEMPTED CHILD MOLESTING—[A FELONY]
>
> [On or about] April 16, 2006, in the County of Lake, State of Indiana, Ronald E. Batenich, a person at least twenty-one years of age did attempt to perform or submit to sexual intercourse or deviate sexual conduct with [H.M.], a child under fourteen years of age, and during the course of the attempt Ronald E. Batenich lay on a couch with [H.M.] positioned in front of him but facing away from him on the couch and Ronald E. Batenich pulled down the pants and underpants of [H.M.] and exposed his penis and placed oil on the buttocks of [H.M.] and on his penis contrary to I.C. 35-42-4-3 and I.C. 35-41-5-1, and against the peace and dignity of the State of Indiana.
>
> COUNT II—CHILD MOLESTING—[C FELONY]
>
> [O]n or about April 16, 2006, in the County of Lake, State of Indiana, Ronald E. Batenich did perform or submit to the fondling or touching of [H.M.] with [H.M.] with intent to arouse or satisfy the sexual desires of Ronald Batenich or [H.M.], a child under fourteen . . . years of age,

> contrary to I.C 35-42-4-3 and against the peace and dignity of the State of Indiana.

Appellant's App. p. 7. As discussed above, the jury found Batenich guilty of child molesting, a class C felony, and attempted battery, a class B misdemeanor.

Indiana Code Section 35-41-1-16 defines an "included offense" as an offense that

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
>
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
>
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interests, or a lesser kind of culpability, is required to establish its commission.

Notwithstanding the above, if the evidence indicates that one crime is independent of another crime, it is not an included offense. Ingram v. State, 718 N.E.2d 379, 381 (Ind. 1999).

In Pedrick v. State, 593 N.E.2d 1213, 1217 (Ind. Ct. App. 1992), this court determined that "[b]attery is not an inherently included offense of child molesting because it is possible to commit the latter crime solely by submitting to a touch rather than performing one." (Emphasis added). However, we also observed that the charging information alleged that Pedrick performed or submitted to touching or fondling of the victims in order to arouse or satisfy his sexual desires. Therefore, we concluded that the charging information contained the elements of battery as a factually lesser included offense. Id.; accord Johnson v. State, 464 N.E.2d 1309, 1310-11 (Ind. 1984) (observing

that elements of battery were alleged in the information charging the defendant with attempted murder where the element of substantial step toward the commission of murder set forth in the charging information alleged a touching).

As noted above, the State alleged that Batenich molested H.M. by "perform[ing] or submit[ting] to the fondling or touching of [H.M.]." Appellant's App. p. 7. Thus, following the lead of Pedrick and Johnson, the offense of attempted battery is a factually included lesser offense of child molesting as a class C felony in this case. And Indiana Code section 35-38-1-6 controls, which provides that when a defendant is found guilty of both a greater and a lesser-included offense, "judgment and sentence may not be entered . . . for the included offense." As a result, we must remand this case with instructions that the trial court vacate Batenich's conviction and sentence for attempted battery. See Webster v. State, 708 N.E.2d 610, 616 (Ind. Ct. App. 1999) (holding that where a defendant is found guilty of both the greater offense and the lesser included offense, the trial court's proper procedure is to vacate the conviction for the lesser included offense and enter a judgment of conviction and sentence only upon the greater offense).

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions that the trial court vacate Batench's conviction and sentence for attempted battery.

MATHIAS, J., and BROWN, J., concur.